STATE OF MICHIGAN

COURT OF APPEALS

WOODLORE CONDOMINIUM ASSOCIATION, Plaintiff-Appellant,	UNPUBLISHED November 13, 2014
v	No. 317566 Wayne Circuit Court
LUZ T. ZINCHUCK, CHARLES W. COSSIN, JR., and LARRY COSSIN, Defendants-Appellees.	LC No. 11-011852-NZ

Before: WHITBECK, P.J., and FITZGERALD and MURRAY, JJ.

PER CURIAM.

The trial court issued an order granting summary disposition to defendants Luz T. Zinchuck and Charles W. Cossin, Jr. ("C. Cossin") under MCR 2.116(C)(7) and (8), and denied plaintiff leave to amend its complaint on grounds of futility. A motion for reconsideration was subsequently denied. The court also issued an order setting aside a default against defendant Larry Cossin ("L. Cossin"). The case was reassigned to a new judge, who issued an order granting L. Cossin summary disposition and denying plaintiff's "motion pursuant to MCR 2.613(B) for correction of substantive mistake" by the previous judge. From this final order, plaintiff appeals as of right.[1] We affirm.

[1] We find it necessary to point out potential deficiencies in plaintiff's brief on appeal. In particular, in three of the four arguments presented, plaintiff only states that the arguments set forth in its motion for reconsideration and brief in support are incorporated by reference into the brief on appeal. That motion and supporting brief were attached as exhibits to the brief on appeal. There are no facts, law, or argument set forth under any of the three argument headings, which appears to be in conflict with the detail required by MCR 7.212(C)(7). And, although earlier in the brief plaintiff cites to MCR 2.113(F)(2) and (G) for the ability to do this, those rules only apply to pleadings, and briefs clearly do not fail within the clear definition of a pleading. See MCR 2.110(A). Thus, nothing in the court rules appears to provide support for incorporating a trial court brief into an appellate court brief such that it is properly presented on appeal. But, a Practice Note to our Internal Operating Procedures does address the impact such a practice has on a brief's length, indicating that the page length of an attachment or other

Plaintiff originally filed a multi-count complaint that included claims based on the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 USC 1961 *et seq*. Defendants C. Cossin and Zinchuck removed the action to federal court. The RICO claims were dismissed and state law claims for breach of fiduciary duty, conversion, unjust enrichment, and misrepresentation/fraud were remanded to circuit court.

Plaintiff first argues that the circuit erred in granting defendants C. Cossin and Zinchuck summary disposition of the breach of fiduciary duty and misrepresentation claims,[2] or in declining to allow plaintiff to amend its complaint to supplement the pleading with respect to these claims and to add claims for negligence, violation of the condominium association master deed, injunctive relief and an accounting, and, with respect to C. Cossin only, contribution/indemnification. Further, plaintiff argues that the successor judge erred in denying their motion to correct these alleged errors.

> A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the claim on the basis of the pleadings alone and the ruling is reviewed de novo. The motion must be granted if no factual development could justify the plaintiff's claim for relief. When deciding a motion under MCR 2.116(C)(8), the court must accept as true all factual allegations contained in the complaint. Whether a defendant owes a particular plaintiff a duty is a question of law that this Court reviews de novo.

Regarding denial of the request to amend the complaint, review is for an abuse of discretion. *Casey v Auto Owners Ins Co*, 273 Mich App 388, 400-401; 729 NW2d 277 (2006). Since a motion to correct under MCR 2.613(B) is akin to a motion for reconsideration, we conclude that review is also for an abuse of discretion. See *King v Oakland Co Prosecutor*, 303 Mich App 222, 233 n 4; 842 NW2d 403 (2013).

MCR 2.116(I)(5) provides that when a motion for summary disposition is granted based on MCR 2.116(C)(8), "the court shall give the parties an opportunity to amend their pleadings as provided in MCR 2.118, unless the evidence then before the court shows that an amendment would not be justified." MCR 2.118(A)(2) provides that a party may amend a pleading by leave of court but that leave to amend "shall be freely given when justice so requires." However, leave

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document would be included in the brief page limit. See Practice Note to IOP 7.212(B). However, I read that to be simply addressing the page limit implications, not whether solely incorporating another brief as the only argument presented is sufficient to adequately present the argument on appeal. See *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998) (issues not briefed or properly supported are abandoned). We think it is likely not sufficient to adequately present the argument on appeal, but we do not so conclude in this appeal because no case law has yet read MCR 7.212(C)(7) to preclude this practice. However, plaintiff's argument in Issue IX, *infra*, challenging the trial court's decision to set aside the default was not adequately briefed, for although it does contain relevant law, it provides only a conclusory sentence that the trial court should not have set aside the default aside. *Mudge*, 458 Mich at 105.

[2] Plaintiff agreed that the conversion and unjust enrichment claims could not survive summary disposition.

to amend a complaint may be denied if an amendment would be futile. *Franchino v Franchino*, 263 Mich App 172, 189; 687 NW2d 620 (2004).

I. BREACH OF FIDUCIARY DUTY

In the original complaint, plaintiffs averred that defendants C. Cossin and Zinchuck, who had been directors and/or officers of the Association until they were removed from these positions on May 27, 2008, owed fiduciary duties to the Association and its members. The limitations period for a breach of fiduciary duty claims is three years. *Miller v Magline, Inc*, 76 Mich App 284, 313; 256 NW2d 761 (1977); MCL 600.5805(10); *Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Inst*, 266 Mich App 39, 47; 698 NW2d 900 (2005). The complaint was filed on September 27, 2011, more than three years beyond the date that these fiduciary relationships ended.

Nonetheless, plaintiff avers that defendants fraudulently concealed this claim, pointing to the alleged withholding of a contract between plaintiff Association and Bill Haddad of KBKS Maintenance Landscaping Company until August 13, 2010. Plaintiff claimed that defendants presented earlier bogus contracts in the Haddad matter — Zinchuck when she provided a contract handwritten on a napkin on March 18, 2008, and C. Cossin when he presented a contract on April 29, 2008. Plaintiff further alleged that Haddad presented a third bogus contract at the arbitration, that it came out that these defendants had copies, and that they "'sandbagged' the Association by holding onto copies of a purported, but false, 'contract' which copies contained the only original signatures." Under MCL 600.5855, "[i]f a person who is or may be liable for any claim fraudulently conceals the existence of the claim . . . from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim, . . . although the action would otherwise be barred by the period of limitations." A claim for breach of fiduciary duty "accrues when the beneficiary knew or should have known of the breach." *Prentis Family Foundation, Inc*, 266 Mich App at 47. Here, plaintiff in essence maintains that there were various breaches of fiduciary duty and that the breach in not producing the third purported contract was concealed until the arbitration, which precluded plaintiff from adequately assessing its liability to Haddad. However, plaintiff also avers that once it was aware of the alleged contract it did not change its position relative to Haddad. Rather, the board rejected a settlement because it was "aware of the falsity of Haddad's position." Thus, although this specific alleged breach may have been within the limitations period, plaintiff did not effectively allege that it was damaged by this breach. Accordingly, summary disposition for failure to state a claim for breach of fiduciary duty in the original complaint was proper.

Nonetheless, plaintiff sought to amend the breach of fiduciary duty claim to assert that the duties "survived the termination of their offices" since these defendants "implore[d] others to repose faith, confidence and trust in their advice" based on their former positons and C. Cossin "induced" members to do so. They pointed to representations that these defendants had made at a September 27, 2011 annual meeting, to C. Cossin's dissemination of materials to members, and to C. Cossin allegedly deceiving the arbitrator.

We conclude that plaintiff failed to allege a viable claim for breach of fiduciary duty in its proposed first amended complaint. As plaintiff notes, "[d]amages may be obtained for a

breach of fiduciary duty when a 'position of influence has been acquired and abused, or when confidence has been reposed and betrayed.'" *Prentis Family Foundation, Inc*, 266 Mich App at 47 (citation omitted). With respect to Zinchuck, no claim is stated because imploring others to repose confidence does not mean that others did so. Thus, even if reposing confidence in someone were enough to create a fiduciary duty, the proposed pleading as to Zinchuck was deficient. However, plaintiff in essence avers that others did repose confidence in C. Cossin with respect to materials he disseminated. Nonetheless, in *Prentis Family Foundation, Inc*, 266 Mich App at 43-44, the Court states:

> "[A] fiduciary relationship arises from the reposing of faith, confidence, and trust and the reliance of one on the judgment and advice of another." [*Teadt v Lutheran Church Missouri Synod*, 237 Mich App 567, 580-581; 603 NW2d 816 (1999)], citing *Vicencio v Ramirez*, 211 Mich App 501, 508; 536 NW2d 280 (1995). However, the placement of trust, confidence, and reliance must be reasonable, and placement is unreasonable if the interests of the client and nonclient are adverse or even potentially adverse. *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 260-261; 571 NW2d 716 (1997).

In *Teadt*, 237 Mich App at 581, the Court notes that "[a] person in a fiduciary relation to another is under a duty to act for the benefit of the other with regard to matters within the scope of the relation." Since C. Cossin was no longer a board member, he was not under a duty to act for the benefit of members and it would not have been reasonable for members to place confidence in him as a fiduciary based on his prior status as a board member. Accordingly, the trial court did not abuse its discretion in declining to allow an amendment of this claim because the amendment would have been futile.

II. INTENTIONAL AND INNOCENT MISREPRESENTATION

In *Kassab v Mich Basic Prop Ins Ass'n*, 441 Mich 433, 442; 491 NW2d 545 (1992), citing *Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976), quoting *Candler v Heigho*, 208 Mich 115, 121; 175 NW 141 (1919), the Court set forth the following elements for a claim of fraud:

> (1) That defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury.

In *Unibar Maintenance Servs, Inc v Saigh*, 283 Mich App 609, 621; 769 NW2d 911 (2009) (citation and quotation omitted), the Court stated: "A claim of innocent misrepresentation is shown if a party detrimentally relies upon a false representation in such a manner that the injury suffered by that party inures to the benefit of the party who made the representation." Plaintiff set forth counts for intentional misrepresentation and innocent misrepresentation in its complaint and proposed amended complaint, and then suggested in its motion for reconsideration that it could also make out claims for fraud in the inducement and silent fraud. In *Samuel D Begola Services, Inc v Wild Bros*, 210 Mich App 636, 639; 534 NW2d 217 (1995) (citations omitted),

the Court noted that while "in general, actionable fraud must be predicated on a statement relating to a past or an existing fact, Michigan also recognizes fraud in the inducement. Fraud in the inducement occurs where a party materially misrepresents future conduct under circumstances in which the assertions may reasonably be expected to be relied upon and are relied upon." In contrast, "[s]ilent fraud is essentially the same [as fraudulent misrepresentation] except that it is based on a defendant suppressing a material fact that he or she was legally obligated to disclose, rather than making an affirmative misrepresentation." *Alfieri v Bertorelli*, 295 Mich App 189, 193; 813 NW2d 772 (2012). MCR 2.112(B)(1) provides that "[i]n allegations of fraud or mistake, the circumstances constituting fraud or mistake must be stated with particularity." In *Chesbrough, MD v VPA, PC*, 655 F3d 461, 467 (CA 6, 2011), quoting *United States ex rel Bledsoe v Community Health Sys, Inc*, 501 F3d 493, 503 (CA 6, 2007), the court interpreted the federal counterpart to MCR 2.112(B)(1), FR Civ P 9(b), as requiring that the plaintiff "allege (1) 'the time, place, and content of the alleged misrepresentation,' (2) 'the fraudulent scheme,' (3) the defendant's fraudulent intent, and (4) the resulting injury."

First, plaintiff quotes a communication on a website in which C. Cossin allegedly said that L. Cossin had exercised "bad judgment" with respect to his handling of the repair and insurance claim regarding a damaged carport, but that "he was a much better person than the picture being painted about him." Although plaintiff insists this was made as a statement of fact, it was clearly a statement of opinion, not fact. It was not actionable fraud.

Next, plaintiff avers that Zinchuck fraudulently provided members with financial information that was knowingly incorrect or misleading. It states that the September 30, 2007 general ledger and September 30, 2007 trial balance did not match, and avers that on October 29, 2007, Zinchuck acknowledged inadvertent inaccuracies,. It alleges that given her "intent to mislead, incompetence and negligence" she would not sign off on the balances. Further, it averred that as a result of this "scheme", plaintiff could not collect funds from members. While this is specific as to time, content and place, other than the error itself the only statement was one admitting error. Such an admission cannot be characterized as a misrepresentation.

Next, plaintiff avers that at a board meeting on March 18, 2008, Zinchuck represented that a handwritten piece of paper was the Haddad contract. Plaintiff avers that this handwritten contract differed from the contract C. Cossin presented at the April 29, 2008 board meeting, which had a provision guaranteeing Haddad payment through November 2009. Further, plaintiff avers that "the tape-recorded colloquies at the February and March, 2008 Board meeting, and other indicia of fraud by [these defendants] expose beyond doubt the falsity of the purported, guaranteed 'contract' . . .and yet [these defendants] persisted in supporting the untenable proposition that Haddad had a guaranteed contract." Plaintiff notes that this second contract differed only slightly from the contract that Haddad presented at arbitration. Plaintiff seems to be averring that Zinchuck and C. Cossin misrepresented that Haddad had a guaranteed contract and in the next paragraphs, aver that these defendants retained copies of a signed but false contract that Haddad presented at arbitration; plaintiff avers Zinchuck falsely represented in a June 23, 2008 letter that she did not have a copy of the signed copy. Finally, plaintiff averred that C. Cossin perjured himself at the arbitration but does not specify the content of the alleged perjury. Plaintiff averred that the alleged perjury and defendants' actions resulted in plaintiff incurring damages "by way of attorney fees and costs and the arbitrator's fees."

The only specific allegations here are that Zinchuck represented that a handwriting was a contract on March 18, 2008, C. Cossin represented that a contract was a valid contract on April 29, 2008, and Zinchuck falsely represented in a June 23, 2008 letter that she did not have a copy of the signed contract. The statute of limitations for fraud claims is six years, MCL 600.5813; *Kuebler v Equitable Life Assurance Society of the United States*, 219 Mich App 1, 6; 555 NW2d 496 (1996), and accordingly, if otherwise viable the claim would not be time-barred. These three allegations were specific as to time, place and content, and from the surrounding allegations, it can be inferred that plaintiff is alleging that these alleged misrepresentations were intentional. The fraudulent scheme is less clear; there is, for example, no suggestion that these defendants schemed to defraud plaintiff for personal gain and no indication that they gained anything as a result of Haddad prevailing on his contract claim against the Association. Even more problematic, however, is that it is not clear from the pleading that the representation that the two documents were contracts resulted in injury. Plaintiff does not aver that it would have prevailed in the arbitration or would not have incurred the fees and costs if these defendants had not made these two representations. Moreover, with respect to Zinchuck's alleged misrepresentation that she did not have a copy of the signed contract, where plaintiff's position in the arbitration did not change when presented with the signed version, plaintiff's alleged damages do not flow from this misrepresentation. Thus, plaintiff did not state a claim for relief with respect to these allegations.

Finally plaintiff makes general averments in its proposed amended complaint about alleged misrepresentations aimed at derailing the board's attempt to update the condominium documents. There is nothing specific, however, as to time, place or content. However, in the allegations pertaining to the breach of fiduciary duty claim, plaintiff avers that these defendants made false statements at the September 27, 2011 annual meeting. While this is specific as to time and place, there is no specificity as to the content of the statements. Thus, these allegations also fail to make out a claim on which relief can be granted.

III. TORTIOUS INTERFERENCE WITH A CONTRACT OR EXPECTANCY

Plaintiff titled its proposed claim as "tortious interference with contract, advantageous business relationship or expectancy", but then alleges only an expectancy.[3] Specifically, plaintiff alleged that it had an expectancy of a business relationship with a third party for landscaping and snow removal services for 2010 through the present, and that C. Cossin interfered by testifying falsely to the existence of a contract with Haddad and by doing other lawful acts with malice and without justification for the purpose of invading plaintiff's business expectancy.

In *Mino v Clio Sch Dist*, 255 Mich App 60, 78; 661 NW2d 586 (2003) (citations omitted), the Court stated:

> The elements of tortious interference with a business relationship are the existence of a valid business relationship or expectancy, knowledge of the

[3] Had plaintiff alleged tortious interference with a contract, the claim would have failed because there was no contract in existence. See *In CMI Int'l, Inc v Internet Int'l Corp*, 251 Mich App 125, 131; 649 NW2d 808 (2002).

> relationship or expectancy on the part of the defendant, an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and resultant damage to the plaintiff. To establish that a lawful act was done with malice and without justification, the plaintiff must demonstrate, with specificity, affirmative acts by the defendant that corroborate the improper motive of the interference. Where the defendant's actions were motivated by legitimate business reasons, its actions would not constitute improper motive or interference.

C. Cossin's alleged perjury did not constitute "an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy" because, even if the perjury could be viewed as a direct cause of a contract not coming into being, there is no allegation that a valid business relationship or expectancy was in existence such that breach or termination could have occurred. Accordingly, the trial court did not abuse its discretion in disallowing an amendment to add this claim.

IV. CIVIL CONSPIRACY

Plaintiff proposed to add a civil conspiracy claim against C. Cossin and Zinchuck, averring that they engaged in a concerted action to thwart plaintiff's management by a duly elected board as evidenced by the refusal to turn over documents after removal from the board, their provision of false Haddad contracts and C. Cossin's perjured testimony, and their efforts to scuttle attempts to amend condominium documents. "A civil conspiracy is a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means." *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 257 Mich App 365, 384; 670 NW2d 569 (2003), aff'd 472 Mich 91 (2005) (quotation omitted). Thwarting plaintiff's management by a duly elected board is not criminal or unlawful. Moreover, while perjury would involve criminality, the other alleged actions would not, and plaintiff claims that only C. Cossin committed perjury. Thus, there is no combination of two or more persons. There was no abuse of discretion in disallowing an amendment to add this claim.

V. NEGLIGENCE

Plaintiff purported to add a negligence claim against C. Cossin and Zinchuck. They averred that as co-owners, these defendants owed the Association and members a duty to comply with the Michigan Condominium Act and the condominium documents. They further averred that "the foregoing acts" constitute a breach of those duties, that the breach continues so long as they refuse to turn over books and records, and that plaintiff suffered damages. Plaintiff cites no authority for its proposition that as co-owners these defendants owed plaintiff a duty. In *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003), the Court stated:

> "A party may not leave it to this Court to search for authority to sustain or reject its position." *Magee v Magee*, 218 Mich App 158, 161; 553 NW2d 363 (1996). The appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, *Wilson v Taylor*, 457 Mich 232,

> 243; 577 NW2d 100 (1998); *Ambs v Kalamazoo County Road Comm*, 255 Mich App 637, 650; 662 NW2d 424 (2003), nor may he give issues cursory treatment with little or no citation of supporting authority, *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984), after remand 211 Mich App 214; 535 NW2d 568 (1995). Argument must be supported by citation to appropriate authority or policy. MCR 7.212(C)(7), *Thomas v McGinnis*, 239 Mich App 636, 649; 609 NW2d 222 (2000); *Haefele v Meijer, Inc*, 165 Mich App 485, 494; 418 NW2d 900 (1987), remanded 431 Mich 853; 425 NW2d 691 (1988). An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue. *Yee v Shiawassee County Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002).

We conclude that this issue was abandoned.

VI. VIOLATION OF MASTER DEED

Plaintiff averred that C. Cossin violated the condominium master deed and by laws by using his co-ownership in two condominiums to confer voting rights upon himself and membership in the Association even though his only interest was commercial (as a landlord), that he also used the membership to disseminate misstatements to other co-owners to prevent amendments of the condominium document, and that he inserted himself into Association matters better left to the board by falsifying the Haddad contract and maintaining a website purported to be an Association website. Plaintiff recites the following provision from the master deed:

> No co-owner shall use his apartment or the common elements in any manner inconsistent with the purposes of the project or in any manner which will interfere with or impair the rights of another co-owner in the use and enjoyment of his apartment or the common elements.

The alleged actions of C. Cossin, while perhaps not laudatory, did not "impair the rights of another co-owner in the use and enjoyment of his apartment or the common elements." This provision was clearly not intended to make a co-owner liable for breach of the master deed by virtue of the fact that ownership came with membership rights. There was no abuse of discretion in disallowing an amendment to add this claim.

VII. INJUNCTIVE RELIEF/ACCOUNTING

Plaintiff avers that these defendants continue to publish misrepresentations, withhold books and records, account for value improperly received, and maintain a website ostensibly on behalf of the Association. "Injunctive relief is an extraordinary remedy that courts normally grant only when (1) justice requires it, (2) there is no adequate remedy at law, and (3) there exists a real and imminent danger of irreparable injury." *Higgins Lake Prop Owners Ass'n v Gerrish Twp*, 255 Mich App 83, 106; 662 NW2d 387 (2003) (citations and quotations omitted). Plaintiff has not specified what exactly these defendants have been saying to other co-owners such that this Court can evaluate whether it is opinion or misrepresentation. It is not clear from the record that these defendants are withholding books and records that came into their possession while on

the board. Similarly, it is not clear whether C. Cossin and/or L. Cossin are maintaining a website representing that they speak on behalf of the Association. Accordingly, plaintiff has failed to demonstrate that injunctive relief is an appropriate remedy.

VIII. CONTRIBUTION/INDEMNITY

Plaintiff claims it is entitled to indemnification from C. Cossin for the attorney fees and costs associated with the Haddad arbitration as well as potential liability if the judgment is upheld, and that it is also entitled to indemnification for wasted costs associated with failed initiatives to amend the condominium documents and increased administrative and other costs owing to the failure to amend. Plaintiff does not purport to claim a contractual right. Moreover, plaintiff does not develop its argument that it otherwise has a right to indemnification. However, "[t]he right to common-law indemnity is based upon an equitable principle: where the wrongful act of one party results in another being held liable, the latter party is entitled to restitution from the wrongdoer." *Paul v Bogle*, 193 Mich App 479, 497; 484 NW2d 728 (1992). Nonetheless, this right appears to be paired with negligence and vicarious liability:

> "Common-law indemnity is intended only to make whole again a party held vicariously liable to another through no fault of his own. This has been referred to as 'passive' rather than 'causal' or 'active' negligence." [*Peeples v Detroit*, 99 Mich App 285, 292; 297 NW2d 839 (1980).] "It has long been held in Michigan that the party seeking indemnity must plead and prove freedom from personal fault. This has been frequently interpreted to mean that the party seeking indemnity must be free from active or causal negligence." *Langley v Harris Corp*, 413 Mich 592, 597, 321 NW2d 662 (1982). Therefore, a common-law indemnification action "cannot lie where the plaintiff was even .01 percent actively at fault." *St. Luke's Hospital v Giertz*, 458 Mich 448, 456, 581 NW2d 665 (1998); see also *Paul v Bogle*, 193 Mich App 479, 491, 484 NW2d 728 (1992) (observing that "common-law indemnity . . . require[s] that the person seeking indemnification be free from any active negligence"). [*Botsford Continuing Care Corp v Intelistaf Healthcare, Inc*, 292 Mich App 51, 62-63; 807 NW2d 354 (2011)].

Since the Haddad matter was a contract claim, and there is no evidence of a contract or other basis for seeking indemnification from a co-owner/former board member, plaintiff could not prevail on such a claim. Accordingly, there was no abuse of discretion in disallowing an amendment.

IX. ORDER SETTING ASIDE DEFAULT

Plaintiff next argues that the trial court erred in setting aside a default against L. Cossin. A ruling on a motion to set aside a default is reviewed for a clear abuse of discretion. *Shawl v Spence Bros, Inc*, 280 Mich App 213, 220; 760 NW2d 674 (2008). We conclude that there was no abuse of discretion in this case.

MCR 2.603(D)(1) provides:

> A motion to set aside a default or a default judgment, except when grounded on lack of jurisdiction over the defendant, shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed.

In *Levitt v Kacy Mfg Co*, 142 Mich App 603, 608; 370 NW2d 4 (1985), quoting *Bigelow v Walraven*, 392 Mich 566, 576 n 15; 221 NW2d 328 (1974), quoting 2 Honigman & Hawkins, Michigan Court Rules Annotated (2d ed), p 662, the Court noted that good cause can be shown by

> " (1) a substantial defect or irregularity in the proceedings upon which the default was based, (2) a reasonable excuse for failure to comply with the requirements which created the default, or (3) some other reason showing that manifest injustice would result from permitting the default to stand."

In *Shawl*, 280 Mich App at 238-239, the Court elaborated on the requirements for setting aside a default:

> In determining whether a party has shown good cause, the trial court should consider the following factors:
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> (1) whether the party completely failed to respond or simply missed the deadline to file;
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> (2) if the party simply missed the deadline to file, how long after the deadline the filing occurred;
>
> (3) the duration between entry of the default judgment and the filing of the motion to set aside the judgment;
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> (4) whether there was defective process or notice;
>
> (5) the circumstances behind the failure to file or file timely;
>
> (6) whether the failure was knowing or intentional;
>
> * * *
>
> In determining whether a defendant has a meritorious defense, the trial court should consider whether the affidavit contains evidence that:
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> (1) the plaintiff cannot prove or defendant can disprove an element of the claim or a statutory requirement;
>
> (2) a ground for summary disposition exists under MCR 2.116(C)(2), (3), (5), (6), (7) or (8); or
>
> (3) the plaintiff's claim rests on evidence that is inadmissible.

> Neither of these lists is intended to be exhaustive or exclusive. Additionally, as with the factors provided in other contexts, the trial court should consider only relevant factors, and it is within the trial court's discretion to determine how much weight any single factor should receive.

"[I]f a party states a meritorious defense that would be absolute if proven, a lesser showing of 'good cause' will be required." *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 233-234; 600 NW2d 638 (1999).

Here, the court noted only that there had been procedural irregularities without specifying which irregularities it found significant. Apart from the fact that this case went back and forth between state and federal courts, it is significant that at the time plaintiff sought a default a settlement conference was imminent and had been rescheduled from March 22, 2012 to May 8, 2012 at the behest of plaintiff's counsel. The default request was filed on April 3, 2012, at a time when L. Cossin, who was acting in propria persona, would have reasonably believed that nothing was going to occur at least until the settlement conference took place. Once the default request and affidavit was filed, L. Cossin immediately secured counsel who filed an answer on April 6, 2012 and moved to set aside the default on May 4, 2012. On these facts, there was no clear abuse of discretion in the finding of good cause.

Regarding a meritorious defense, in the affidavit attached to the motion, L. Cossin maintained that he had never misrepresented his actions to the Association, and indicated that he had done the repair to the carport after being approved by the responsible insurance company and was subsequently paid by the insurance company for the work performed. He maintained that there was no impropriety with respect to this transaction. Apart from the affidavit, it is noted that this transaction occurred in 2008, beyond the limitations period, and thus the conversion and unjust enrichment claims relative to L. Cossin would have been time-barred. Accordingly, there was no clear abuse of discretion with respect to the finding of a meritorious defense or with respect to the decision to set aside the default.

Affirmed.

/s/ William C. Whitbeck
/s/ E. Thomas Fitzgerald
/s/ Christopher M. Murray